No. 13938

United States Court of Appeals

For the Ninth Circuit

JACK KALPAKOFF,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

J. B. TIETZ
257 S. Spring Street,
Los Angeles, California
Attorney for Appellant

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction of the appellant by the District Court of the Southern District of California.

This court has jurisdiction under the provisions of 28 United States Code, Sections 1291 and 1294 (1).

STATEMENT OF THE CASE

Appellant was indicted on November 19, 1952 under U. S. C., Title 50, App. Sec. 462—Universal Military Training Service Act, for refusing to report for induction [A. 3].[1]

[1]All references to the Transcript of Record are designated by pages of it, as follows: [R. 3]. A photocopy of the entire Selective Service File of Appellant was entered in evidence as Government's Exhibit 1-A. The file is not part of the Transcript of Record but is before the court. All references to the file are designated as pages of Exhibit 1-A, as follows: [Ex. p. 3]; the pagination of Exhibit 1-A is by a one-quarter inch high pencilled number, circled, and ordinarily is found at the bottom of each sheet of the Exhibit.

Appellant was convicted by Judge William C. Mathes on March 26, 1953 [R. 26]; he was sentenced by said judge to a 4-year term of imprisonment on April 7, 1953. [R. 4-6].

In the court below as well as before the Selective Service agencies, appellant claimed to be a conscientious objector to all participation in military activities and he was entitled to a classification as such, to-wit: I-0. He also claimed to be entitled to a II-A classification, on the basis of his farm work.

In his Classification Questionnaire appellant set forth the facts of his farm work. [Ex. p. 8]. Subsequently other material was added to show that he met the standard set up by the selective service regulations for the II-A agricultural classification. [Ex. pp. 13-14 (1948), 15-16 (1950), 58-59, 68-70, 73].

As is to be seen by the Minutes of Action by Local Board and Appeal Board [Ex. p. 11] he was classified I-A on November 4, 1948. He made a timely, written appeal for the farm work classification; on October 5, 1950, he was reclassified to the III-A classification. Class III-A is for a registrant with dependents [his father needed his services on the farm] and since it has the equivalent, deferment-effect of a II-A agricultural classification appellant took no appeal.

On March 26, 1951, appellant visited the office of the local board. Although he was in the III-A deferred classification he asked for and was given SSS Form No. 150, Special Form for Conscientious Objectors.

[Ex. 19]. He completed and filed this form on March 30, 1951. [Ex. pp. 20-23].

In his Special Form for Conscientious Objectors he set forth the details requested concerning his religious training and his religious belief. Subsequently many letters from ministers and elders of the Molokan community were added; petitions bearing signatures of members of the Molokan congregation were also placed in the file.

The board considered his claim for a conscientious objector's classification on April 5, 1951, and decided against giving him either one of the two such classifications, I-O or I-A-O. Nevertheless, on said date it reclassified him into Class I-A, although it possessed no new evidence reflecting in any way on his status as a registrant entitled to a III-A classification nor on his concurrent claim for a II-A classification.

Appellant filed a timely written appeal but the Appeal Board gave him no relief.

During the trial appellant complained that there was a failure of proof in that the Order to Report for Induction was invalid because the evidence demonstrated it was unexecuted, [R. 11]; that the purported Order to Report was otherwise invalid first, because the classification of I-A was arbitrary and without basis in fact [R. 10]; second, because he was denied due process of law in connection with the hearing before the Hearing Officer of the Department of Justice; and finally that the court erred in refusing him the

opportunity, during the trial, to inspect and use the F.B.I. investigative reports.

I.

THERE WAS NO PROOF THAT A VALID ORDER TO REPORT FOR INDUCTION HAD BEEN ISSUED.

Appellant was indicted for failure to *report* for induction [R. 3). The usual conscientious objector prosecution is based on an indictment for failure to *submit to* induction. Thus, in *Kent. v. United States,* 207 F. 2d 234, this court dealt with an appellant who complained that the order to report had been executed by an unauthorized person. The court pointed out that appellant responded to the order and did not place his refusal to be inducted on the ground of an improper signature. [236].

The instant appellant did not report. Whether he recognized the infirmity of the order is immaterial; he didn't obey it. He believes he is in a position to challenge it, whereas appellant in the *Kent* case, *supra,* was not.

It was pointed out to the trial court [R. 11] that there was no evidence that the Order to Report for Induction was signed, page 51 of the exhibit being a photocopy of the Order, and the only proof offered. Section 1632.1 of the Selective Service Regulations (32 C.F.R. §1632.1) is as follows:

QUESTIONS PRESENTED

1. When a selectee is ordered to report for and submit to induction and is thereafter indicted and tried for failure to *report* for induction is some evidence required that the order to report was ever executed?

2. Are the following individually, or collectively, denials of due process:

> First, were the tests for sincere conscientious objection, used by the hearing officer of the Department of Justice, lawful ones?
> Second, did the hearing officer mislead appellant concerning the adverse evidence (so that opportunity for rebuttal or explanation was not afforded, said adverse evidence being used thereafter as a basis for his recommendation)?
> Third, was appellant entitled to copies of the hearing officer's report and the Attorney General's opinion in advance of the appeal board's decision, despite the fact no regulation requires that such an opportunity to rebut be given?

3. Was there any basis in fact for denying appellant a continuation of his dependency classification, for denying his claims for an agricultural classification and for one of the two conscientious objector classifications?

4. Was the appellant entitled to use the F. B. I. reports he had subpoenaed to show the trial court that the hearing officer's report was not an honest one?

SPECIFICATION OF ERRORS

The District Court erred

1. In not concluding that there was a failure of proof that a valid order to report had been issued [R. 11].

2. In not concluding that appellant had been denied due process of law in connection with his hearing before the hearing officer of the Department of Justice [R. 10, 25-26].

3. In not concluding that the final classification of appellant was without basis in fact [R. 10, 26].

4. In refusing appellant permission during trial to use the F. B. I. reports to impeach the honesty of the hearing officer's recommendation [R. 24].

"1632.1 Order to Report for Induction.—Immediately upon determining which men are to report for induction, the local board shall prepare for each man an Order to Report for Induction (SSS Form No. 252) in duplicate. The date specified for reporting for induction shall be at least 10 days after the date on which the Order to Report for Induction (SSS Form No. 252) is mailed, except that a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may be ordered to report for induction on any date after he has so volunteered if an appeal is not pending in his case and the period during which an appeal may be taken has expired. The local board shall mail the original of the Order to Report for Induction (SSS Form No. 252) to the registrant and shall file a copy in his Cover Sheet (SSS Form No. 101)."

Appellant believes that the regulations do not require the board to make in "duplicate" any other Order or Notice sent to a registrant. A typical method of recording action is found in §1623.4(d) Action To Be Taken When Classification Determined:

"(d) When the local board classifies or changes the classification of a registrant, it shall record such classification on the Classification Questionnaire (SSS Form No. 100) the Classification Record (SSS Form No. 102), and in the space provided therefor on the face of the Cover Sheet (SSS Form No. 101)."

In a few instances the regulations require that "copies" of documents be preserved and it has been held that local boards must obey such mandatory provisions.

On December 14, 1953, Judge Harry C. Westover (S. D. of Calif.) declared, in his written memorandum of opinion in *United States v. Nichols,* No. 22,951, wherein he acquitted the defendant:

> "However, if the local board determines that the new facts would not justify a change in classification and refuses to reopen, the regulations provide:
>
> > " 'In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file.'
>
> "On 9/30/52, when the local board refused to reopen registrant's case, it mailed him form C-140. Even if Form C-140 should be considered a letter, no copy of said form appears in registrant's selective service file. As a consequence, there is no escape from the conclusion that the local board did not follow the regulations."

Preservation of a duplicate of the Order to Report for Induction is important in the event proof is needed of the precise execution of the act. This order is a most serious notice and, in fact, is the only one issued in the name of the President of the United States.

Appellant submits that the defect complained of is jurisdictional and that the public interest requires that orders of such importance be executed and not be like blank checks.

> *United States ex rel. Bayly v. Reckord,* 51 Fed. Supp. 507:
>
> "*And the regulation must be observed,* not so much out of tenderness for the individual, but *for the public benefit.* It is incidental only that the petitioners, as individuals specially affected, are entitled to invoke the application of the regulation." [Emphasis supplied.] [p. 515].

Ordinarily, even less important safeguards, required by the regulations to be observed as a condition precedent to induction into the Armed Forces, must be strictly followed. If not observed, the order to report is considered void. See *Ver Mehren v. Sirmeyer,* 36 F. 2d 876, 882: "There must be full and fair compliance with the provisions of the Act and the applicable regulation." Also see *United States v. Zieber,* 161 F. 2d 90. This principle is widely recognized so that there have been over four dozen trial decisions in the last two years where the failures of the Selective Service System to comply with regulations have resulted in acquittals. In *United States v. Strebel,* 103 Fed. Supp. 628, the court concluded: "The Court finds as a fact that the regulations were not fully complied with. It therefore concludes, as a matter of law, that the motion for a judgment of acquittal at the close of all the evidence should be granted." [631].

Although liberality of decision is not necessarily needed in the instant case, appellant believes it is to be observed that the recent selective service decisions are more liberal than those of Wold War II. The reason is perhaps correctly stated in *Ex Parte Fabiani,* 105 Fed. Supp. 139. The opinion is of added interest because it is the last reported decision of former Attorney General McGranery as a District Judge:

> "The purpose of the 1948 and 1951 Acts, to the contrary, is merely to achieve and maintain sufficient armed strength to deter aggression; it is not to prepare for war.
>
> . . .
>
> "The different objective to be achieved by the new Act behooves us to employ a more liberal standard of judicial review, so as better to protect the rights of the individual. Should—which God forbid—world tensions increase greatly or should general war come, then the judicial arm can once again cut to the barest minimum its supervision of the operations of the draft." [146-7].

There should have been some proof on this essential element. There was not a word of testimony from any of the board members or the clerk that the duplicate sent the defendant had been signed or even that they were customarily signed. All that can be presumed is that the appellant was sent and received the original duplicate of the SSS Form No. 252 reproduced in the Exhibit at page 51. Appellant believes this court's concluding expression in *Knox v. United States,* 200 F.

2d 398 disposes of the usual crutch of presumption of regularity:

> "But, it is suggested, a presumption of regularity or of the due performance of duty attends official action; and it should be presumed in this instance not only that the local board considered the claim of the registrant, but that in light of them it took action to continue in effect his original 1-A classification. We think the court may not indulge the presumption, at least in the latter respect, in the condition of the record in the case. Our reasons for so believing have already been sufficiently developed." [402].

II.

APPELLANT WAS DENIED DUE PROCESS OF LAW IN CONNECTION WITH HIS HEARING BEFORE THE HEARING OFFICER OF THE DEPARTMENT OF JUSTICE.

FIRST: *The hearing officer based his Advisory Opinion on a misconception of the law.* In rejecting appellant's professions that he was a genuine conscientious objector the hearing officer used many items of conduct and of belief as standards, none of which are legal tests. The only test is that set up by the Act and the Regulations: sincere religious belief, based on religious training. (§6(j) of the Act and §§1622.11 and 1623.14 of the Regulations).

The hearing officer's advisory opinion (Ex. 43-44) uses the following: "that he would protect his family

and his farm, . . . only in recent years that he has refrained from smoking and drinking, and that he works on Sunday, and that he was in the Merchant Marine for six months."

There is nothing in the selective service law that proscribes smoking, drinking, belief in self-defense, working on Sunday or in the Merchant Marine. Nor did his religious leaders consider that his conduct disqualified him from being considered a good Molokan or that he wasn't sincerely a genuine conscientious objector on religious grounds. On the contrary the hearing officer relates that the elder testified ". . . he had known registrant all his life and that the young man had accepted the Spirit and is of good character, and that he goes to church every Sunday. . . ."

The use of illegal standards has been the subject of several recent decisions.

The most recent is by the Eighth Circuit: *Taafs v. United States,* ..... F. 2d ....., decided December 7, 1953, No. 14.791. The court struck down, as an illegal standard, that Taafs was not a pacifist; the court held that Taafs' belief in self-defense did not disqualify him for a conscientious objector classification:

> "A person's willingness to use force in self-defense is not a valid objection to denial of conscientious objector status where other evidence of his opposition to participation in war because of religious belief is undisputed. *United States v. Pekarski,* 2 Cir., Doc. No. 22,636, ...F. 2d .....; *Annett v. United States,* 10 Cir., 205 F. 2d 689."

Pekarski, supra, decided October 23, 1953 held:

> "The willingness to act in self-defense and then only without weapons appears to us to be no negation of his evidence that he was conscientiously opposed by reason of his religious training and belief to service in the armed forces in noncombatant duty. We cannot distinguish this case from *Annett v. United States,* 10 Cir., 205 F. 2d 689, which we are disposed to follow in holding that the local board had no evidence before it to support the classification of the registrant 1-A-O."

Annett, supra, decided June 26, 1953 discusses illegal standards more than the later decisions. In addition to the oft-quoted "The statute does not make humility, whatever that means, an element of one's right to exemption from military service on the ground of religious scruples and beliefs against war." [692].

The Tenth Circuit stated:

> "During the investigation, Annett was asked if he believed in self defense and he frankly stated that he did and that he would kill if necessary to defend and preserve his life. Belisle believed that this was inconsistent with the claim of religious scruples and beliefs against participation in war. In his report he stated, 'Your hearing officer was not impressed with the manner in which the registrant answered questions propounded to him. There is an abundant amount of evidence furnished in his behalf, principally by members of his own faith. However, a large portion of it is

devoted to his ministerial activities, which your hearing officer is not endeavorng to pass upon other than in connection with the claim of registrant as a conscientious objector. Your hearing officer is unable to reconcile the belief of the registrant that he may, under the Scriptures, defend himself even to the extent of killing, but not able, under his faith, to serve his country in military service; especially, where he was unable to state his authority for the defense of himself in the same Bible which he uses to sustain his objections. Your hearing officer is not satisfied with the sincerity of the registrant for the further reason that the evidence furnished by the registrant was inadequate and did not have that quality necessary to sustain his position.'

"It is thus clear that Belisle applied an erroneous standard in determining that Annett was not entitled to a conscientious objector status. The standard laid down in the statute is religious training and belief opposed to participation in war in any form and as stated in the statute, 'Religious training and belief in this connection means an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relations . . .' Annett's positive uncontradicted testimony established that his religious beliefs met this test. The mere fact that he was willing to fight in defense of his own life does not mean that he did not have good faith religious scruples based upon the teachings of his church against the command of his country to go to war and kill therein." [691].

It is appellant's belief that his expressed willingness to protect his family and his farm and his history of having been 6 months in the merchant marine are met by the above decisions and this court is urged to follow the Second, Eighth and Tenth Circuits on this subject.

It is appellant's belief that the other matters used by the hearing officer in his advisory opinion are wholly inapplicable as tests for a Molokan's religious belief and/or are answered adequately by the factual material in the Exhibit. However, the use of these items of fact by the hearing officer damaged appellant. This point is well put in *United States v. Everngam*, 102 F. Supp. 128:

> "It does not appear that any member of the appeal board felt himself bound by this report and recommendation or how far, if at all, it influenced the decision of the appeal board, but that is not enough. The report and recommendation was transmitted to the appeal board to use as an advisory opinion, and was considered and used (as the regulations require) by the appeal board in its subsequent classification of the defendant. Under such circumstances the prosecution was bound to prove that such invalid report and recommendation of the hearing officer of the Department of Justice did not affect the decision of the appeal board, or any subsequent decision of the local board. No such proof was offered. And had such proof been offered, there is considerable doubt whether such proof would have cured the error,

> inasmuch as the report and recommendation of the Department of Justice is an important and integral step in the conscription process, for the protection of the registrant, as well as the government."

SECOND: The hearing officer misled the appellant into thinking that the adverse F.B.I. gathered material was not of controlling important and then unfairly used it to reject appellant's claim.

The hearing officer encouraged the appellant to believe he could expect a not unfavorable recommendation:

> "Well, as we were ready to leave, he gave us all a big smile and shook our hands and told us that he felt that all us conscientious objectors should be allowed to get off; that if he had his way, all of us would, would not have to—well, I don't know how I should state it—none of us would have to go through this." [R. 20].

The opportunity the hearing officer gave appellant to rebut and discuss unfavorable evidence was insufficient to give the hearing officer a correct understanding of the meaning of "receiving the Holy Spirit" [R. 19], or that appellant had been a "weak Christian" only to age 15 [R. 18], or that work on Sunday was not proscribed for Molokan farmers [R. 19] and that the elder's presence at the hearing was a stamp of approval [R. 19]. Had appellant been informed of the hearing officer's fragmentary conception of the

facts he could have made an intelligent attempt to meet this adverse situation. In *United States v. Bouziden,* 108 F. Supp. 395 the court disapproved of such a hearing as not being a fair one:

> "The purpose of the hearing is to enable the hearing officer to form an intelligent opinion regarding the registrant. The opinion formed is reflected in the advisory recommendation to the appeal board. The hearing officer must not be permitted to withhold unfavorable information gained during the inquiry, and giving no opportunity to rebut at the hearing, *then use this same unfavorable information as a basis for his adverse advisory recommendation.* If this is done the hearing itself becomes a sham and a farce. Why hold a hearing to determine a fact if there is a predetermination of the fact and no intent to discuss the basis of the predetermination?" [398]. (Italics are Judge Wallace's.)

THIRD: Appellant should have been furnished copies of the hearing officer's advisory opinion to the Department of Justice, and of the Department's recommendation to the Appeal Board *before* the Appeal Board acted.

Appellant's attempt, after the die was cast (Ex. 47-49), to rebut the hearing officer's adverse advisory opinion (Ex. 41-44) emphasizes the unfairness of not furnishing the appellant such documents *before* the appeal board acted.

In carrying out the conscientious objector procedure of Section 6(j) of the Universal Military Training and Service Act it has always been, and still is, the policy of the Department of Justice to not give an opportunity to the registrant to answer an unfavorable recommendation. It sends its recommendation to the board of appeal without notice to the conscientious objector. The appeal board acts on the recommendation without first notifying the registrant. It does not give him a chance to answer the unfavorable recommendation made by the Department of Justice. These acts of the department and the appeal boards violate the act and the due process clause of the Fifth Amendment.

The act says that classifications must be fair and just. The Fifth Amendment guarantees due process of law. When the departmental recommendation is adverse and is acted upon by the appeal board without notice to the registrant to deny his claim for classification as a conscientious objector it is neither fair and just nor in accordance with due process.

Therefore, the procedure followed by the Department of Justice and the Selective Service System in all conscientious objector cases handled by the department is invalid. The registrant should have the right to answer the unfair report and recommendation before the appeal board. Since he does not, he is not given a full and fair hearing before the appeal board. The recommendation is made available to the registrant after the appeal board has denied his conscientious objector claim, classified him and returned the file

to the local board. After he has lost the appeal it is too late for the registrant to see the adverse recommendation. He must see it in time to protect himself before the appeal board. Since the adverse recommendation is considered without notice to the registrant and is followed there is a denial of due process in violations of the Act and the Fifth Amendment.

The Department of Justice and the board of appeal deprived the defendant of his procedural rights to due process of law. This the Department of Justice did by not mailing a copy of its recommendation to the defendant and giving him an opportunity to answer the adverse recommendation before forwarding it to the appeal board. The appeal board did this by considering the final classification of the defendant without sending to him a copy of the unfavorable departmental recommendation and giving him opportunity to answer it before it denied the conscientious objector status.

Appellant placed directly before the trial court the issue of the correctness and fairness of the hearing officer's advisory opinion and that fairness and due process required that it be available to him *before* the appeal board acted. [R. 15-20]. Concerning the Attorney-General's recommendation to the appeal board: appellant believes it is necessarily bound-up with the hearing officer's advisory opinion and that the appellant may properly ask this court to consider his argument that he was entitled to a copy of both documents before the appeal board acted.

Supporting this argument are:

United States v. Abilene & S. Ry. Co., 265 U. S. 274, 290;

Interstate Commerce Comm'n v. Louisville & Nashville R. R. Co., 227 U. S. 88, 91-92, 03;

State of Washington ex rel. Oregon R. R. & Navigation Co. v. Fairchild, 224 U. S. 510, 524;

Kwock Jan Fat v. White, 253 U. S. 454, 459, 463, 464;

Morgan v. United States, 304 U. S. 1, 22, 23;

Chin Yow v. United States, 208 U. S. 8, 11, 12;

See also:

Degraw v. Toon, 151 F. 2d 778 (2nd Cir.);

Chen Hoy Quong v. White, 249 F. 2d 869 (9th Cir. 1918);

Mita v. Bonham, 25 F. 2d 11, 12;

O'Hara v. Berkshire, 76 F. 2d 204, 207 (9th Cir.).

III.

THE CLASSIFICATION OF APPELLANT IN CLASS I-A WAS ARBITRARY AND WITHOUT BASIS IN FACT.

The appellant presented evidence that he was a farm worker, meeting all the standards of the selective service regulations for an agricultural classification (II-A); his evidence also showed that he was a registrant having a dependent, and entitled to the dependency classification of III-A. Since the regulations state that on every classification and reclassification the registrant is to be placed in the "lowest" class his evidence requires [32 C.F.R. 1623.2] appellant was classified in Class III-A, this class being "lower" than Class II-A.

When appellant was reclassified on April 5, 1951 from Class III-A to Class I-A the board acted arbitrarily and without any basis in fact for it possessed no information reflecting adversely on the evidence used as its basis for the III-A; nor had the standards of the selective service regulations for a III-A or II-A been changed. On the contrary, some new evidence had been added that corroborated and supported his claims for the lower classifications of III-A and II-A.

Possibly the basis for the demotion was a belief that his claim of March, 1951 for a conscientious objector classification disqualified or discredited him. This alone could not. As was said in the recent *Taafs*

decision *(Taafs v. United States,* ..... F. 2d ....., 8 C.A., decided December 7, 1953:

> "It is made clear by the authorities, as well as by the Act itself, that successive deferments may be claimed on different grounds. Selective Training and Service Act of 1940, Sec. 5 (h), 50 U.S.C.A. App. sec. 305 (h); *United States v. Stalter,* 7 Cir., 151 F. 2d 633; *United States v. Graham,* 109 F. Supp. 377. Section 305 (h) of the 1940 Act is now contained in section 456 (k), 50 U.S.C.A. App. 456 (k)."

To this could be added the following from the *Bodenstein* case *(U. S. ex rel. Bodenstein v. Nichols,* 151 F. 2d 155):

> "If the lower Court meant to hold that a III-D dependency classification was not available to a conscientious objector it was in error. See 'Selective Service as the Tide of War Turns,' page 178,[1] where the following is found: The objector, like all other registrants, may be entitled to deferment on the grounds of occupation or dependency, and until or unless such deferment is canceled, the issue would not be raised. The objector receives the same treatment as all other registrants.'
>
> "[1] We take that to mean that a conscientious objector, who is eligible to a Class III-D deferment, would first receive such a classification and that the issue of his conscientious objections would not be raised until and unless the III-D classification was canceled." [157].

Possibly the basis for the demotion was a prejudice against conscientious objectors. If this was the reason then no argument is needed.

In any event some basis in fact was needed to justify the demotion. As was said in *Ex Parte Stanziale,* 49 F. Supp. 961 (rev. on other grounds in 138 F. 2d 312):

> "[1] It is concluded as a matter of law that when the Local Board on January 15, 1942, classified Adolph B. Stanziale in Class 3-A it made a proper classification in accordance with the facts before it. That when the Board on November 13, 1942, changed his classification from Class 3-A to Class 1-A and subsequently ordered his induction with nothing before it changing the situation that existed on January 15, 1942, their action in so reclassifying Adolph B. Stanziale and subsequently ordering his induction was unlawful, arbitrary and capricious." [962].

The Supreme Court's latest Selective Service decision also covers this point. *Dickinson vs. United States,* ..... S. Ct....., decided November 30, 1953. The final sentence of Dickinson is:

> "But when the uncontroverted evidence supporting a registrant's claim places him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."

IV.

THE COURT ERRED IN REFUSING APPELLANT PERMISSION DURING THE TRIAL TO INSPECT AND USE THE F. B. I. INVESTIGATION REPORTS.

During the trial the appellant desired to inspect these reports (R. 20-). The court made an in camera inspection and ruled that the value of the reports to the appellant was outweighed by the public interest in preserving the secrecy of the F.B.I. investigation. (R. 24).

It is not enough that the trial court be satisfied. The appellant should have had the opportunity to inspect, then use and argue whatever material of value to his defense existed therein.

Further, without such an inspection he could not determine if he had been given a fair resume.

During the trial appellant attempted to establish that the hearing officer did not make a fair report. The trial court apparently did not believe that a hearing officer's advisory opinion could be the basis of a claim of denial of due process. The court ruled "What is in the hearing officer's report . . . is immaterial." (R. 16).

This was before publication of this court's decisions in *Linan vs. United States,* 202 F 2 693 and *Kent vs. United States,* 202 F. 2 234 wherein it was stated that a hearing officer's advisory opinion could be so factually incorrect that all further processing was vitiated.

Finally the hearing officer misconstrued the testimony given him concerning the meaning of receiving the Holy Spirit as understood by appellant and his religious leaders. (R. 19). The hearing officer misrepresented the "working on Sunday" point with respect to the *Molokan's* attitude on such activity. (R. 19). The same is true with respect to their attitude on smoking and drinking. R. 20). The hearing officer's report (Ex. 44) clearly gave the Attorney General and the appeal board to understand that such conduct adversely reflected on the sincerity of appellant. Such conduct, in many of the 400 denominations existing in the United States unquestionably would reflect on a registrant's sincere acceptance of the tenets of his sect. This is common knowledge. The appeal board and the Attorney General considered the hearing officer their man on the spot, their expert. What do they know about Molokans? In fact, there are Molokan groups only in southern California. When the hearing officer used such standards the Attorney General and the appeal board had the right to assume that he knew what he was talking about; that such standards were used by the Molokans in differentiating true followers from "weak Christians". How much the hearing officer's poor advisory opinion influenced them we do not know but the damage was done. See *Everngam, supra.*

CONCLUSION

For the errors above discussed the judgment of guilty should be reversed.

Respectfully submitted,

J. B. TIETZ
Attorney for Appellant.